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**SENATE COMMITTEE ON  
BANKING AND FINANCIAL INSTITUTIONS**  
Senator Steven Bradford, Chair  
2019 - 2020 Regular

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<b>Bill No:</b>	SB 472	<b>Hearing Date:</b>	April 10, 2019
<b>Author:</b>	Caballero		
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<b>Urgency:</b>	No	<b>Fiscal:</b>	No
<b>Consultant:</b>	Eileen Newhall		

**Subject:** Earned Income Access Service Providers

**SUMMARY** This bill establishes a regulatory framework for the regulation of earned income access service providers, as specified.

**EXISTING LAW:**

- 1) Does not include, within the codes that generally apply to financial services providers, a statutory framework for the regulation of businesses that allow employees and independent contractors to gain access to wages they have earned, prior to their regular payday.
- 2) Provides that no person shall issue in payment of wages due, or to become due, or as an advance on wages to be earned any order, check, draft, note, memorandum, or other acknowledgement of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, as specified (Labor Code Section 212).

**THIS BILL**

- 1) Defines the terms “delivery,” “consumer,” “earned income,” “earned but unpaid income,” “earned income access service provider,” and “earned income obligor.”
  - a) Earned income is money that a consumer (i.e., a natural person) has represented, and an earned income access service provider has reasonably determined, have accrued to the benefit of that consumer for services rendered to an earned income obligor.
  - b) An earned income obligor is either an employer or another person who is contractually obligated to pay a consumer a sum of money for labor or services provided by that consumer to or on behalf of that other person, as specified.
  - c) An earned income access service provider is a person engaged in the business of delivering earned but unpaid income to a consumer in California.
- 2) Authorizes an earned income access service provider to offer earned income access services in either of the following ways:
  - a) Through a contractual arrangement with an earned income obligor in which the provider delivers earned income to the consumer prior to the consumer’s payday,

and the obligor deducts the amount of the earned income delivered by the provider from the consumers next paycheck. This arrangement is colloquially known as the “direct to business” model.

- b) Through a contractual arrangement with a consumer in which the provider delivers earned income directly to a consumer and is repaid directly by the consumer. This arrangement is colloquially known as the “direct to consumer” model.
- 3) Requires earned income access service providers to do all of the following:
- a) Allow a consumer to cancel participation in an earned income access program at any time without incurring a charge for doing so.
  - b) Provide each consumer with a document, written in a minimum 10-point font size and in language intended to be understood by a layperson, informing the consumer of his or her rights under the earned income access program, including instructions for how to cancel participation.
  - c) Deliver earned income to a consumer via any means mutually agreeable to the consumer and provider and refrain from charging consumers different amounts, based on the manner in which the consumer elects to receive the funds.
  - d) Provide more than 50% of the amount of a consumer’s gross earned but unpaid income as of the date and time of the consumer’s request for funds.
  - e) Charge a consumer more than \$14 per monthly pay period for participating in an earned income access service program, an amount that must be prorated for shorter periods (thus, this fee could not exceed \$7 per pay period for workers who get paid twice a month). Fees may be charged on a periodic basis, a per delivery basis, or a combination of the two, but may not exceed the \$14 per month cap.
  - f) Provide earned income to a consumer more than three times in a single pay period.
  - g) Limit the number of pay periods per year during which a consumer may access earned income prior to their payday.
  - h) Provide in its contract with an obligor that the obligor may not charge a consumer, directly or indirectly, for participating in an earned income access service program.
- 4) Requires earned income access service providers to maintain a minimum net worth of at least \$250,000; a fidelity bond or bonds in an amount not less than \$250,000, as specified; and errors and omissions insurance in an amount not less than \$250,000, as specified; and clarifies that each of these requirements is independent of one another, and an act taken to satisfy one of these requirements may not be used to satisfy either of the others.

- 5) Prohibits an earned income access service provider from doing any of the following:
- a) Requiring a consumer to open, maintain, or close a checking account at any particular depository institution, accept direct deposit of his or her wages into any specific depository institution; or sign up for a product or service that entails an additional cost, as a condition of offering earned income access services to that consumer.
  - b) Trying to debit a consumer's depository institution account after the provider has attempted to initiate three consecutive failed payment transfers from that account. Notwithstanding this prohibition, a provider may initiate additional payment transfers from a consumer's account after three consecutive failed attempts, if the additional payment transfers are authorized by the consumer following the failed attempts.
  - c) Initiating a payment transfer from a consumer's account without first notifying that consumer, at least two days before the date of each transfer, of the amount due and the date the transfer will be attempted.
  - d) Making false or materially misleading statements or representations; engaging in fraudulent or dishonest dealings; failing to account for any moneys belonging to others that may be in the possession of or under the control of the provider; committing a crime of fraud, misrepresentation, deceit, embezzlement, misappropriation of funds, robbery, or theft; or materially failing to fulfill its contractual duties to a consumer or obligor, unless that failure is due to circumstances beyond the control of the provider.
- 6) Provides that a person who violates the aforementioned rules is subject to a civil suit in a court of competent jurisdiction.
- 7) Provides that the delivery of earned but unpaid income to a consumer by an earned income access service provider in accordance with the aforementioned rules does not represent a credit transaction, because the funds provided to the consumer are those that the consumer has already earned. Further provides that the imposition of one or more fees on a consumer who opts to use the services of an earned income access service provider does not represent a violation of Labor Code Section 212, as long as the consumer is informed of his or her right to receive the full amount of his or her wages, without discount, if the consumer waits until his or her regular payday.

## **COMMENTS**

- 1) Purpose: This bill is sponsored by PayActiv to protect the interests of California consumers who use the services of earned income access service providers; provide legal certainty to earned income access service providers by establishing a regulatory framework for their lawful conduct in California; and maintain public confidence in earned income access service providers.
- 2) Background: According to information provided by the sponsor and available online, there appear to be at least six companies currently offering earned income access

services: PayActiv ([www.payactiv.com](http://www.payactiv.com)), Even ([www.even.com](http://www.even.com)), DailyPay ([www.dailypay.com](http://www.dailypay.com)), Earnin ([www.earnin.com](http://www.earnin.com)), FlexWage (<https://flexwage.com/>), and ZayZoon (<https://zayzoon.com/>). The business models of these companies vary.

Some of the companies work via a direct-to-business model (D2B). In this model, the provider contracts with an employer that agrees to share employment and attendance data with the provider. Employees and independent contractors who work for the employer are invited to sign up for the service, which is typically made available via an online app. The fee for the service can be paid by the employer, by both the employer and the consumer, or, more commonly, by the consumer. When a consumer elects to receive a wage advance from a provider that has a D2B arrangement, the provider informs the employer of the amount of money advanced to the consumer, and, in states where payroll deductions are permitted, the employer deducts that amount from the consumer's next paycheck. In states where payroll deductions are not permitted, the provider debits the consumer's bank account on or after the consumer's payday.

The second business model currently in use is known as the direct-to-consumer model (D2C). In this model, the provider may, but need not, contract with a company that offers payroll or time and attendance services. In cases where a payroll or time and attendance company is involved, the provider is able to obtain employment and attendance data from its payroll or time and attendance partner. In cases where no payroll or time and attendance company is involved, the provider typically uses information provided by the consumer as the basis to calculate how much money an employee has earned as of the date and time of their request for a wage advance. In both cases, when the consumer requests a wage advance, the provider advances the money directly to the consumer and then debits the consumer's bank account on or after the consumer's next payday. All fees are paid by the consumer.

Some of the companies in this space offer a suite of consumer-focused services in addition to wage advances. Even offers a budgeting tool along with its wage advance service. PayActiv offers a budgeting and savings tool, financial counseling, and bill paying service along with its wage advance services. FlexWage offers a financial wellness service.

Fees charged by the companies also vary. PayActiv charges a flat fee per pay period (\$5 for a two-week or longer pay period and \$3 for a weekly pay period). DailyPay charges a flat fee of \$1.25 for next-day delivery and \$2.99 for instant money transfers, payable each time the consumer requests an advance. Earnin doesn't charge fees; instead, it encourages its users to tip the company when they feel their financial situation allows. All of these companies limit the number of times per pay period their users may request wage advances, but the limits vary from company to company.

- 3) Discussion: Despite the variability summarized above, all of the companies in this space are attempting to address the same problem: the challenges faced by individuals who live paycheck to paycheck, and whose expenses often come at a time when they are in-between paychecks. The Center for Financial Services

Innovation published a typical case study documenting the challenges faced by this population (<https://cfsinnovation.org/research/amy-cox-household-profile-living-paycheck-to-paycheck/>), but the situation is common enough that almost everyone has their own example. Although estimates regarding the size of this population vary, this bill's sponsor cites a statistic from PricewaterhouseCoopers to claim that 70% of U.S. households live paycheck to paycheck. Furthermore, even if an individual can cover his or her typical monthly expenses, four in ten Americans lack the savings to cover a \$400 emergency expense, according to the most recent Federal Reserve Board Survey of Household Economics and Decisionmaking.

Earned income access service providers offer a service that can help people living paycheck to paycheck reduce the mismatches between their income streams and debt obligations. These services can also help people who encounter an emergency expense cover that expense without going into debt. The popularity of these services suggests that the business model is addressing a true need. According to recent articles ("Do paycheck advance apps improve financial health?", *American Banker*, Penny Crosman, March 11, 2019, and "Popular cash advance app Earnin operating in payday loan 'gray area,' critics claim," Kevin Dugan, *New York Post*, March 21, 2019), 300,000 employees use InstaPay, a service provided through a partnership between PayActiv and Even. Over ten million people have downloaded Earnin. One hundred companies offer DailyPay.

Is the service truly helpful? Opinions vary. Earned income access service providers assert that the service helps employers reduce employee turnover, improve employee retention, and recruit employees who prefer real-time pay. It also helps users avoid higher-cost alternatives like payday loans, bank overdraft fees, and other late charges. Todd Baker, a Harvard University researcher, compared PayActiv's \$5 fee to the cost of payday loans and overdraft fees. Baker found that a \$200 salary advance from PayActiv costs one-sixth as much as a payday loan (\$5 versus the \$30 a \$200 payday loan would cost). Baker also calculated that the PayActiv fee was one-seventh the cost of the typical bank overdraft fee. John Thompson, chief program officer at the Center for Financial Services Innovation noted, "We're just beginning to explore the potential for these tools. Right now they feel very promising. They could give people the ability to act quickly in an emergency and have access to and use funds in lieu of a payday loan or some other high-cost credit or consequences they would rather avoid, like an overdraft fee."

However, Thompson also sees a potential downside. "The every-other-week paycheck is one of the few normal structures we have for people around planning, budgeting, and managing their money. Without that structure, which is a form of savings, we're going to have to work hard to make sure we don't just turn people loose on their own with even less structure or guidance or advice." Others quoted in the *American Banker* article cited above expressed concern that people could become addicted to wage advance tools and dig themselves into a deeper hole. Concern over how wage advances are used has led several of the providers to offer budgeting and other tools intended to help users achieve financial stability.

- 4) Regulatory Interest: As is often the case when a new financial services business model is rolled out, state regulators have expressed interest. California's Department of Business Oversight has engaged in discussions with the companies

currently operating in California, and the New York Department of Financial Services recently subpoenaed Earnin, seeking 21 different categories of records (“Cash-advance app Earnin gets subpoenaed by NY regulator,” Kevin Dugan, *New York Post*, March 28, 2019). The New York subpoena followed complaints from Earnin customers, who were saddled with overdraft fees following software glitches and spotty customer service. New York’s financial services regulator is also looking into Earnin’s practice of encouraging its users to pay tips rather than fees and into allegations that, although tips are optional, those who do tip are eligible for larger advances. Furthermore, because Earnin’s customers are encouraged to leave tips of at least \$9 on \$100 weekly advances, the company has been accused by consumer advocates of attempting to evade New York’s interest rate cap (in New York, an interest rate greater than 16% is considered civil usury, while an interest rate greater than 25% is a criminal offense).

This bill is an attempt by the bill’s sponsor to provide earned income access providers operating in California with the regulatory certainty that is lacking elsewhere. If enacted, this bill could become a national model for the regulation of this industry.

- 5) The Approach Taken In This Bill: This bill does not create a new licensing law for earned income access service providers, nor does it amend an existing licensing law to include earned income access service providers. Instead, it uses an approach the Legislature has used in the past when facing the reality that there were too few companies offering a financial service to support a new licensing law (e.g., SB 1007 (Machado), Chapter 708, Statutes of 2008). Like SB 1007, this bill defines the persons and activities the author and sponsor wish to regulate; codifies a series of requirements that must be satisfied by companies wishing to engage in those activities; codifies a series of allowable, required, and prohibited activities; and provides a judicial enforcement mechanism for those who wish to enforce violations of the statute.

The approach taken in this bill reflects the reality that there are too few companies currently offering earned income access services to support a new licensing law. Any new licensing law entails a certain expense. Regulations must be promulgated, licensing staff hired, applications processed, and examination staff hired and trained. These costs can be substantial, and spreading them across a small number of relatively new (and relatively small) companies could put those companies out of business or significantly stunt their growth. These costs could also create a barrier to entry for new companies wishing to enter the market.

This bill’s approach also reflects the reality that no existing regulatory scheme appears to be a good fit for earned income access service providers. The two closest possibilities are the California Financing Law (CFL) and California Deferred Deposit Transaction Law (CDDTL), but neither law can be readily amended to incorporate the earned income access service provider model. For example, the CFL regulates lending activity and contemplates the imposition of an interest rate; providers of earned income are not lending money or charging interest; instead, they are charging a fee to allow a consumer access to money he or she has already earned. The CDDTL regulates the act of advancing money to a consumer who writes a postdated check for money the consumer currently lacks; in the earned

income construct, there is no check, and the money the consumer receives from the provider is money to which the consumer is already entitled. Further, the CDDTL envisions only one advance per pay period, while earned income access service providers typically allow consumers to obtain multiple advances per pay period.

6) Support:

- a) PayActiv, this bill's sponsor, writes, "earned income access provides an exciting new alternative for consumers. Rather than attempting to reduce the supply of expensive and often risky alternative forms of money, earned income access programs provide a less expensive, less risky and socially responsible alternative that can serve to reduce the demand for such money." The personal toll of financial stress can affect consumers' health, and is bad for business, as financial distractions can often lead to a lack of focus and productivity in the workplace. Earned income access programs can help reduce financial stress. Finally, SB 472 "will provide strong consumer protections, impose consumer-friendly requirements on providers of 'earned income access' programs, and create statutory clarity for regulating these programs to ensure consumers have access to the benefits of these socially responsible programs."

7) Opposition: None received.

8) Amendments: The following technical amendments are suggested:

- a) Page 5, line 11, after "either" insert: or both
- b) Page 6, line 34, strike "require" and insert: Open or maintain

**LIST OF REGISTERED SUPPORT/OPPOSITION**

Support

PayActiv (sponsor)

Opposition

None received

-- END --